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COMPATIBILITY OF "THE PRINCIPLE OF NE BIS IN IDEM" WITH THE SANCTION SYSTEM SPECIFIED BY TAX PROCEDURE LAW NO. 213

213 Sayılı Vergi Usul Kanunu'nun Öngördüğü Yaptırım Sisteminin "Ne Bis In Idem İlkesi"ne Uyumluluğu

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ABSTRACT

Considering the provisions of Turkish tax criminal law, the sanctions system provided for in Tax Procedure Law No. 213 sometimes results in a person facing more than one sanction for a single act committed.

This situation raises the question of whether the provisions of Law no. 213 violate the principle of ne bis in idem, which can be defined as the right not to be tried and punished twice for the same act.

The aim of this study is to assess whether the system of sanctions provided by Law no. 213 violates the principle of ne bis in idem within the framework of the criteria adopted in the decisions of the European Court of Human Rights and the Constitutional Court of the Republic of Türkiye.

At first glance, it can be assumed that the sanction system envisaged by Law no. 213 includes regulations that may result in violation of the principle of ne bis in idem.

However, the European Court of Human Rights, in its recent judgments, has opined that the state, which imposed sanctions, had to convincingly demonstrate that multiple proceedings were sufficiently close connection in substance and in time in order to conclude that there was no violation of the principle of ne bis in idem.

It should also be noted that the Constitutional Court of the Republic of Türkiye benefited from these criteria developed by the ECtHR in its decision numbered E:2019/4, K:2021/78, 4/11/2021.

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After all, when assessing in the context of these case-laws, it has been concluded that the sanction system envisaged in Law no. 213 also provides the necessary conditions for the acceptance that multiple trials are sufficiently closely related in terms of substance and time.

Keywords: Tax criminal law, tax misdemeanor, tax crime, right to a fair trial, *ne bis in idem* principle.

ÖZ

Türk vergi ceza hukuku hükümleri gözönüne alındığında 213 sayılı Vergi Usul Kanunu'nun öngördüğü yaptırım sistemi, bazen bir kişinin işlenen tek bir fiilden dolayı birden fazla yaptırımla karşı karşıya kalmasına neden olmaktadır.

Bu durum, 213 sayılı Kanun'da yer alan düzenlemelerin aynı fiilden dolayı iki kez yargılanmama ve cezalandırılmama hakkı olarak tanımlanabilecek *ne bis in idem* ilkesini ihlal edip etmediği sorusunu gündeme getirmektedir.

Bu çalışmanın amacı, 213 sayılı Kanun'un öngördüğü yaptırım sisteminin ne bis in idem ilkesini ihlal edip etmediğini, Avrupa İnsan Hakları Mahkemesi ve Türkiye Cumhuriyeti Anayasa Mahkemesi kararlarında benimsenen kriterler çerçevesinde değerlendirmektir.

İlk bakışta 213 sayılı Kanun'un öngördüğü yaptırım sisteminin *ne bis in idem* ilkesinin ihlali sonucunu doğurabilecek düzenlemeler içerdiği düşünülebilir.

Bununla birlikte, Avrupa İnsan Hakları Mahkemesi, son kararlarında, yaptırım uygulayan devletin, ne bis in idem ilkesini ihlal etmediği sonucuna varmak için, birden fazla yargılamanın özde ve zaman içinde yeterince yakın bağlantılı olduğunu ikna edici bir şekilde göstermesi gerektiği görüşündedir.

Türkiye Cumhuriyeti Anayasa Mahkemesi'nin Avrupa İnsan Hakları Mahkemesi'nin geliştirdiği bu kriterlerden E:2019/4, K:2021/78, 4/11/2021 sayılı kararında yararlandığını da belirtmek gerekir.

Sonuçta, bu içtihatlar bağlamında değerlendirildiğinde, 213 sayılı Kanun'da öngörülen yaptırım sisteminin, birden fazla yargılamanın içerik ve zaman açısından yeterince yakından ilişkili olduğunun kabulü için gerekli koşulları da sağladığı sonucuna ulaşılmıştır.

Anahtar Kelimeler: Vergi ceza hukuku, vergi kabahati, vergi suçu, adil yargılanma hakkı, *ne bis in idem* ilkesi.

INTRODUCTION

Law no. 213 on Tax Procedure imposes tax obligations on taxpayers and other relevant persons and provides for certain sanctions in the event of failure to fulfill or breach of these tax obligations.

This system of sanctions provided for by Law no. 213 sometimes results in a person being subject to more than one sanction for a single act of non-compliance with the tax laws. For this reason, it is debated whether these legal provisions, which result in a person being subject to more than one sanction for a single act, violate the principle of *ne bis in idem*, which can be defined as the right not to be tried and punished twice for the same act.

This debate has also been the subject of the decisions of the Constitutional Court of the Republic of Türkiye *(abbreviated as "TCC")* and the European Court of Human Rights *(abbreviated as "ECtHR")* in terms of the tax system of some European countries.

So, the starting point of this article is to review the compatibility of the principle of *ne bis in idem* with the sanction system specified by Law no 213 on Tax Procedure.

In this study, primarily the concept of the principle of *ne bis in idem* will be analyzed. Then, the appearance of the principle of *ne bis in idem* in Turkish law will be scrutinised. Later on, rules regarding the principle of *ne bis in idem* in Law no. 213 will be specified.

In the field of tax criminal law, it is a common practice that some acts contrary to tax laws are subjected to both administrative and criminal sanctions. As a matter of fact, the situation is the same in the Turkish tax criminal law system. Therefore, in the next stage, the sanction system envisaged in the Law no. 213 will be evaluated in terms of the principle of *ne bis in idem*.

As known, there are some special circumstances that may lead to the conclusion that a legal regulation is not in violation of the principle of *ne bis in idem*, despite the occurrence of conditions that result in a violation of the principle of *ne bis in idem*. One of the particular circumstances identified by the case law of the ECtHR is that the trials are conducted in an integrated manner to form a coherent whole, even though there are technically several trials. In the final section, it will be evaluated whether this special circumstance eliminates the violation of the principle of *ne bis in idem* in terms of the sanction system envisaged in Law no. 213.

It should also be emphasized that this study examines whether the provisions of Law no. 213, which provide for more than one sanction for the same act, violate the principle of *ne bis in idem* in the context of the criteria applied by the ECtHR and the TCC.

I. THE NE BIS IN IDEM PRINCIPLE

The Latin phrase ne bis in idem means *"not twice for the same thing"*. This principle has been known since the time of Roman law and is most often associated with criminal law, in general, with the issue of punishment and legal consequences[1]. In contemporary times, this principle represents one of the most evident indicators of an advanced stage of legal civilization. According to the principle of ne bis in idem, which is accepted as one of the fundamental principles of modern criminal law, a person should not be subject to repeated trial and punishment for a single act[2]. This principle is based on the principle that *"the judgment rendered as a result of the trial in the past has the function of an assurance for the future"* [3]. Accordingly, the principle of ne bis in idem states, *"No one can be re-tried or punished within the scope of criminal proceedings for an act for which he was convicted or acquitted of by a final judgment in criminal proceedings."*.

The ne bis in idem principle is a consequence of the right to a fair trial. Therefore, the ECtHR also states that the ne bis in idem principle is a specific guarantee linked to the right to a fair trial in criminal proceedings[4] [5].

Article 4 of Protocol No. 7 ("the Protocol") to the European Convention on Human Rights ("the Convention") entitled *"The right not to be tried and*

1 Mirandola, S. and Lasagni, G. (2019). "The European ne bis in idem at the Crossroads Administrative and Criminal Law", *Eucrim,* No. 2., p. 126, https://doi.org/10.30709/ eucrim-2019-009// (Accessed: 15 December 2022).

2 Lotito Fedele, S. (2020). "The Ne Bis In Idem Principle in Tax Law: European and Italian Frameworks", *Central European Public Administration Review*, p. 52, https://ssrn.com/ abstract=3611598 (Accessed: 15 December 2022); Czudek, D. (2019). "Ne bis in idem in the tax process", *Prawo Budżetowe Państwa i Samorządu. Torun: Uniwersytet Mikolaja Kopernika, Wydzial Prawa i Administracji,* Vol. 7., No. 1., p. 108; Desterbeck, F. (2019). "Ne bis in idem and tax offences: How Belgium adapted its legislation to the recent case law of the ECtHR and the CJEU", *Eucrim,* No. 2., p. 135–36. https://doi.org/10.30709/ eucrim-2019-009 // (Accessed: 15 December 2022).

3 Özen, M. (2010). "Non Bis İn İdem (Aynı Fiilden Dolayı İki Kez Yargılama Olmaz) İlkesi", *Gazi Üniversitesi Hukuk Fakültesi Dergisi,* Vol. XIV., No. 1., p. 390.

4 ECtHR, *Mihalache/Romania* [GC], App. No: 54012/10, 8/7/2019, § 47.

5 İnceoğlu, S. (2013). *İnsan Hakları Avrupa Mahkemesi Kararlarında Adil Yargılanma Hakkı*, İstanbul: Beta Yayınları, Fourt Edition, p. 339; Yaltı, B. (2015). "İHAM'ın Glantz Kararının Ardından: Kaçakçılıkta Para Cezası ve Hapis Cezası Uygulamasının Non Bis İn İdem İlkesine Aykırılığı Üzerine", *Vergi Sorunları Dergisi,* No. 317., p. 85.

punished twice" governs the ne bis in idem principle. Paragraph 1 of the Article states: *"(1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offense for which he has already been finally acquitted or convicted by the law and penal procedure of that State."*

The purpose of the Protocol is to prevent persons from being subjected to a second investigation, criminal trial or punishment for a crime of which they have been acquitted or convicted with a definite judgment as a result of criminal proceedings[6]. What is prohibited under the article is not only to be punished a second time, but also not to be subjected to a second investigation and trial for the same fact or the alleged act[7] [8].

As can be seen from the rule in Article 4 of the Protocol, certain conditions are necessary to conclude that a provision of domestic law is contrary to the principle of ne bis in idem. The ECtHR clarified these conditions in its decision in *Nikitin v. Russia*. Accordingly, the conditions necessary to establish a violation of the principle of ne bis in idem, recognized as one of the guarantees of the right to a fair trial, are as follows[9]:

i. The existence of a "*criminal trial*",

ii. The fact that this trial has resulted in a final conviction and acquittal,

iii. The conduct of a retrial,

iv. The fact that different proceedings are related to the same act[10].

Protocol No. 7, which includes the ne bis in idem principle, entered into force on 1.8.2016 in Türkiye. Thus, the right not to be tried and punished twice for the same act is guaranteed by the Convention, in addition to being one of the sub-guarantees of the rule of law and the right to a fair trial in domestic law[11].

6 ECtHR, *Marguš/Croatia* [GC], App. No: 4455/10, 27/5/2014, § 114; *Zolotukhin/Russsia* [GC], App. No: 14939/03, 10/2/2009, § 58; *Kadusic/Switzerland,* App. No: 43977/13, 9/1/2018, § 82.

7 ECtHR, *Nikitin/Russia,* App. No: 50178/99, 15/12/2004, § 35.

8 Harris, D., O'Boyle, M., Bates, E. and Buckley, C. (2018). *Law of the European Convention on Human Rights,* Oxfors University Press, Fourth Edition, p. 963; Sejkora, T. (2019). "Non Bis In Idem in Tax Matters. Quo Vadis", p. 51, https://tlq.ilaw.cas.cz/index.php/tlq/article/view/315 (Accessed: 1 August 2022); Kelep Pekmez, T. (2018). "How to understand ne bis in idem ?: The element of idem according to the ECtHR", *Annales de la Faculté de Droit d'Istanbul,* No. 67, p. 36. https://doi.org/10.26650/annales.2018.67.0003 (Accessed: 1 August 2022).

9 ECtHR, *Nikitin/Russia,* § 54.

10 TCC, E.2019/4, K.2021/78, 4/11/2021, § 27.

11 Thus, it is stated that the Protocol No. 7 has become a domestic law rule that should be taken

II. APPEARANCE OF THE NE BIS IN IDEM PRINCIPLE IN TURKISH LAW

The principle of ne bis in idem was not directly included in the Constitution of the Republic of Türkiye dated 1982 (Constitution). However, the TCC considered this principle, among the basic components of the rule of law in its previous decisions and as an element of the right to fair trial regulated in Article 36 of the Constitution in its *Ünal Gökpınar*[12] decision. For this reason, it would not be wrong to say that the principle of ne bis in idem is protected at the constitutional level in the context of the rule of law and the right to a fair trial in the decisions of TCC.

On the other hand, it is seen that the regulations containing the principle of *ne bis in idem* are included in the Turkish legislation on criminal law. First of all, since this principle covers that different trials cannot be made for the same crime, it can be supposed that it is related to the joinder of crimes. Thanks to the joinder of crimes, if a person causes more than one crime to be committed by an act, he is punished with the heaviest penalty.

In terms of misdemeanors, the principle of ne bis in idem has been adopted in terms of imposing an administrative fine if more than one misdemeanor is committed with one act in Article 15 of the Misdemeanor Law No. 5326, titled *"Joinder"*. In this case, the person will be sentenced to only the heaviest administrative fine. In the third paragraph of the Article, it is prescribed: *"If an act is defined as both a misdemeanor and a crime, a sanction can only be applied for the crime. However, in cases where a sanction cannot be applied due to the crime, a sanction is applied due to the misdemeanor."* As it can be clearly understood from the provision of the article, the principle of ne bis in idem is valid in terms of the joinder of crimes and misdemeanors[13].

into account by the courts in case of conflict with the provisions of the domestic law, since it concerns fundamental rights and freedoms within the scope of the fifth paragraph of article 90 of the 1982 Constitution. (Geçer, A. E. (2017). "İnsan Hakları Avrupa Mahkemesi'nin Vergi Cezalarında "Non Bis İn İdem" İlkesine İlişkin A ve B v. Norveç Kararının Türk Vergi Hukuku Uygulamalarına Etkileri", *Vergi Sorunları Dergisi*, No. 350., p. 118-119).

12 TCC, *Ünal Gökpınar* [GK], App. No: 2018/9115, 27/3/2019.

13 As a matter of fact, in the justification of the article, *"An act can constitute both an offence and a misdemeanor in some cases. The third paragraph of the article contains a provision specific to these cases, but only related to joinder. In such cases, only a penalty or security measure can be imposed on the person for the offence; no administrative sanction will be imposed on the grounds that the act constitutes a misdemeanor. Thus, the "ne bis in idem" principle is also valid between offences and misdemeanors. However, in cases where a penalty or security measure cannot be imposed due to the offence, sanctions may be imposed due to misdemeanor."* is called. https://www2.tbmm.gov.tr/d22/1/1-0993.pdf (Accessed: 15 December 2022).

Considering the decisions of the TCC, although it is accepted that the principle of ne bis in idem has a constitutional guarantee within the framework of the principle of the rule of law and the right to a fair trial, it is also emphasized that this principle is not absolute.

The most important individual application decision made by the TCC regarding the ne bis in idem principle in tax criminal law is the decision of *Ünal Gökpınar*. The Court decided that it had not been against the principle of ne bis in idem to impose both administrative sanctions and imprisonment for tax evasion on the applicant for his act of generating income by issuing counterfeit invoice in return for commission.

The Court, in the decision of *Ünal Gökpınar*, held that criminal processes are *"the same act in the legal sense, as they form a unity within themselves in terms of purpose, time and place"*. On this ground, the Court concluded that in both proceedings there was a single act based on essentially the same facts. However, it has been concluded that the principle is not violated because of these punishments as the impugned punishments serve *"for realizing different purposes and legal benefits"* despite the fact that there are different punishment processes and punishments based on the same act.

Regarding norm review, the most important decision of the TCC regarding the ne bis in idem principle in the field of tax criminal law is its decision numbered *E.2019/4, K.2021/78, 4/11/2021*. In this ruling; Article 340, the last paragraph of Article 359 stating *"The application of the penalties written in this Article on those who commit smuggling shall not prevent the separate application of the loss of tax penalty specified in Article 344"*, the sixth paragraph of Article 367 stating *"Imposing a penalty for the crimes specified in Article 359 does not prevent the separate application of loss of tax penalty or irregularity fines."* and the last paragraph of the Article 367 of Law no. 213 have been the subject of the lawsuit. Thus, the Court examined all the rules related to the ne bis in idem principle in Law no. 213 within the framework of the aforementioned principle with this decision, which will be evaluated in detail in the relevant sections below.

III. THE NE BIS IN IDEM PRINCIPLE IN TURKISH TAX LAW

A. THE NE BIS IN IDEM PRINCIPLE IN LAW NO. 213

1. In General

Some of the violations of the rules set by the tax laws in tax criminal law are regulated as *tax misdemeanors (in the doctrinal sense)* and some as *tax offences*, and the sanction to be imposed is determined accordingly[14].

Tax offences are the acts that cause loss of tax or disrupt public order due to non-fulfillment of the duties shown in the tax laws or contrary to these duties and which are punished[15]. Tax offences are economic crimes and its victim is the Treasury. In other words, tax offences are offences against the state treasury[16].

In Law no. 213, *tax evasion, violation of tax privacy* and *doing private business of the taxpayer* are regulated as tax offences. The most common type of crime among tax offences is tax evasion.

Tax misdemeanor, on the other hand, is the actions that are committed by the taxpayer, tax officer or persons concerned in violation of the obligations shown in the tax laws and require administrative sanctions. In Law no. 213; *loss of tax*, *irregularity (1st degree and 2nd degree irregularity)* and *special irregularity* are regulated as tax misdemeanours.

It is important to determine how the perpetrator will be punished in cases where an act leads to more than one tax misdemeanor or is regulated as both *tax misdemeanor* and *tax crime*, because the issue of whether this situation constitutes a violation of the ne bis in idem principle comes to the fore.

Turkish tax law – with one exception – does not include regulations on the principle of ne bis in idem. The most typical example of practices that can be thought to constitute a violation of this principle is encountered when the act regulates both *a tax evasion offence* and *a loss of tax misdemeanor*.

14 *"The tax criminal system is the order that expresses the whole of the judicial and administrative tax crimes and misdemeanors and the sanctions foreseen for them."* (Sarıcaoğlu, E. (2017). *Türk Vergi Hukukunda Vergi Suç ve Kabahatleri Bakımından Yorum ve İspat,* Ankara: Adalet Yayınları, p. 150.)

15 Yüce, M. (2018). *Vergi Kaçakçılığı Suçu (Sahte Belge ve Muhteviyatı İtibariyle Yanıltıcı Belge Düzenleme ve Kullanma Suçu) ve Yargılama Usulü,* Ankara: Adalet Yayınevi, p. 28.

16 Rençber, A. (2017). *Kabahat Genel Teorisi Açısından Vergi Kabahatleri,* İstanbul: İstanbul Ceza Hukuku ve Kriminoloji Arşivi, p. 37; Taşdelen, A. (2010). *Vergi Usul Kanunu Yönünden Vergi Kabahatleri,* Ankara: Turhan Kitabevi, p. 10-11; Yüce, M. (2018). p. 27; Beyribey, K. (2016). "Vergi Kaçakçılığı Suçlarında Ceza Mahkemesi Kararlarının Vergi Yargısına Etkisi", *Danıştay Dergisi,* No. 141., p. 72.

Before examining whether the regulation of an act as both a tax misdemeanor and a tax crime violates the principle of ne bis in idem or not, in the context of tax evasion and tax loss misdemeanor, other situations in Law no. 213 and related to the principle of ne bis in idem will be briefly mentioned.

2. Rules Regarding the Principle of Ne Bis In Idem in Terms of Tax Misdemeanor in Law No. 213

The situation of causing loss of tax is regulated in Article 335 of Law no. 213. Accordingly, in the aforementioned article, it has been emphasized that the joinder rule will be applied: *"If several other types of taxes are lost by a single act that requires a penalty in loss of tax penalty, a separate penalty will be imposed for each tax."*.

In fact, there is only one act here and a single tax misdemeanor is committed with this act. However, this act causes loss of tax in terms of different tax types. In such cases, it is an acceptable practice to impose two different penalties for a single act, as it arises from different tax types in terms of their nature and purposes within the specific system of tax criminal law[17].

Article 336 of Law no. 213 stipulates: *"If a single act that constitutes a penalty loss of tax and irregularity are committed together, only the heaviest penalty will be imposed in terms of amount"*. According to this Article, it is stated that if both loss of tax and irregularity are committed together with a single act, only the heaviest penalty in terms of amount will be applied.

As can be seen, this Article contains a ne bis in idem rule and provides for a single penalty for a single offence. This is the only ne bis in idem provision in Law no. 213.

B. NE BIS IN IDEM PRINCIPLE IN TERMS OF TAX CRIME AND TAX MISDEMEANOR

1. In General

Article 331 of Law no. 213 states *"Those who violate the clauses of tax laws shall be punished with the tax penalties (tax penalty and irregularity penalties) and other penalties written in this book"*. Sanctions regulated in this Article are divided into tax penalties and other penalties.

17 Taşdelen, A. (2010). p. 61.

The acts that are subject to the tax penalty sanction in Law no. 213 are the acts defined as tax misdemeanors in the doctrine. An act considered as a tax misdemeanor in Turkish tax law is determined by the tax administration and an administrative fine (*tax penalty*) is applied to these acts. In Law no. 213, tax crimes are regulated as well as tax misdemeanors. The acts that are foreseen to be punished with other penalties in Article 331 of Law no. 213 are the acts defined as tax crimes. These acts constitute a crime in the sense of criminal law and the determination of them and the enforcement of sanctions falls within the scope of the criminal court.

In the field of tax criminal law, it is a common practice that some acts contrary to tax laws are subjected to both administrative and criminal sanctions[18]. As a matter of fact, the situation is the same in the Turkish tax criminal law system.

Law no. 213 regulates how the perpetrator is punished in cases where an act is regulated as both a tax misdemeanor and a tax crime. Accordingly, Law no. 213 established a fundamental principle enshrining that if the same act constitutes a tax crime and a tax misdemeanor, both shall be punished separately.

In addition, the last paragraph of Article 367 of Law no. 213 specifies: *"Criminal court decisions are not effective on the actions and decisions of the authorities and authorities that will apply the tax penalties written in the second part of the fourth book of this Law, and the decisions to be made by these authorities and authorities do not bind the criminal judge."*. In this way, the possibility of interaction between the authorities applying the said sanctions, which is very important in terms of the ne bis in idem principle, was eliminated[19]. However, the above provision was annulled by the decision of the TCC No. E.2019/4, K.2021/78, 04.11.2021.

18 Radvan, M. and Schweigl, J. (2016). "Penalties in Tax Law in Light of the Principle Ne Bis in Idem", in Etel, L. and Poplawski, M. (Eds.), *Tax Codes Concepts in the Countries of Central and Eastern Europe* (p. 399-410), Bialystok: Temida, https://ssrn.com/abstract=2846695 (Accessed: 15 December 2022).

19 Biyan, Ö. (2016). "Aynı Fiil Nedeniyle Vergi Ziyaı İle Hapis Cezasının Birlikte Uygulanması: Non Bis İn İdem İlkesi", *Lebib Yalkın Mevzuat Dergisi,* No. 145., p. 102; Bilici, N. and Başaran Yavaşlar, F. (2014). "Non Bis İn İdem Kuralı ve Yasallık İlkesi (Türk Vergi Hukuku ve Avrupa İnsan Hakları Sözleşmesi İlkeleri)", *Prof. Dr. Şükrü Kızılot'a Armağan (Editör Prof. Dr. Nevzat Saygılıoğlu),* p. 54.

2. Evaluation of the Sanction System Envisioned in Law No. 213 in Terms of the Criteria Regarding the Ne Bis In Idem Principle Determined by the ECtHR

The circumstances required to conclude that a provision of domestic law is contrary to the ne bis in idem principle were specified by the ECtHR in its decision in *Nikitin/Russia*. Accordingly, in order to speak of a violation of the ne bis in idem principle, which is recognized as one of the guarantees of the right to a fair trial; the following conditions must be found: the existence of a criminal trial, the fact that this trial has resulted in a final conviction or acquittal, the repetition of a criminal trial and different judicial proceedings should be linked to the same act.

a. Whether The First Proceedings were Criminal in Nature

The principle of *ne bis in idem* provides guarantees for crimes of a criminal nature[20]. Offences of a non-criminal nature do not fall within the scope of this principle. Therefore, the application of a second non-criminal sanction or a second investigation or trial for the same act does not violate this principle.

The circumstance of taking a judicial action that includes a criminal sanction is the most important element that determines the scope of the principle. In this context, there is no doubt that the crimes in the traditional criminal law are included in the concept of crime in the constitutional sense. However, the concept of crime is not limited to crimes in the field of traditional criminal law, and it is possible to see unlawfulness in the field of administrative law as crimes in constitutional sense.

First of all, it should be noted that both the ECtHR and the TCC have accepted that the concept of crime and punishment have a different and autonomous content from the criminal law[21].

The ECtHR accepted that it had the power to qualify a sanction legally whether it has a criminal nature or not[22]. The ECtHR's definition of punishment as an autonomous concept independent from the domestic law of the states is the most important fact that paves the way for

20 *"From the historical aspect, the ne bis in idem principle has been applied within one state and it has been limited to the area of the criminal law, which means that it has not been applied to administrative proceedings in which penalties have been imposed."* Matic Boskovic, M. and Kostic, J. (2020). "The Application of the ne bis in idem related to financial offences in the jurisprudence of the European courts", *NBP – Journal of Criminalistics and Law,* Vol. 25., No. 2., p. 69. https://doi.org/doi:10.5937/nabepo25-27224 (Accessed: 15 December 2022).

21 TCC, E.2019/4, K.2021/78, 4/11/2021, § 28.

22 Harris, D., O'Boyle, M., Bates, E. and Buckley, C. (2018). p. 963.

creating a judicial precedent on ne bis in idem in terms of tax criminal law[23] [24]. The ECtHR has demonstrated this definition with the decision of *Engel and Others* ***v.*** *Netherlands*[25]. Thus, the definition of punishment has been separated from the definition of punishment in domestic law and its character as an autonomous concept has become determined by the judgment of the Court[26]. In *the Öztürk v. Germany* decision[27], the ECtHR interpreted the concept of the nature of the crime more clearly and concluded that the sanctions aimed at punishment or deterrence, not compensation, were of a criminal character.

In the case of *Bendenoun v. France*[28], the ECtHR has evaluated whether the administrative fines have a criminal nature or not, in the context of tax law, and has ruled that the administrative fines imposed on tax misdemeanors will be within the scope of criminal sanctions if they have certain characteristics. Accordingly, the sanctions stipulated in the tax legislation for misdemeanors should be applicable to all taxpayers, the penalty should be aimed at penalizing similar behaviours, not reparation of the damage caused by the envisaged sanction, the penalty should be based on a general rule and the amount of the final sanction should be appropriate to the purpose[29] [30].

23 *"Neither article 6, nor article 7 of the European Convention on Human Rights defines the term "sanction" explicitly. According to the case law of the European Court of Human Rights, the nature of the sanction imposed for the infringement of law is the relevant criterion to determine whether the procedure performed by a domestic public law authority against the offender was in accordance with the criminal procedure."* Sejkora, T. (2019). p. 48.

24 Radvan, M. and Schweigl, J. (2016).

25 ECtHR, *Engel and Others/The Netherlands*, App. No: 5100/71; 5102/71; 5354/72; 5370/72, 8/6/1976, §§ 82-83.

26 *"The ECtHR developed its doctrine in the leading case Engel and Others v. The Netherlands in 1976. A first starting point for the assessment of whether a punitive measure is criminal in nature is the classification of the offence in domestic law. However, this criterion is of minor importance. More decisive criteria are the nature of the offence and the degree of severity of the penalty that the person concerned risks incurring (second and third criteria). The authority who imposes a punishment is totally irrelevant for the application of the Engel doctrine to the ne bis in idem principle. Administrative measures can be considered criminal in nature, although they are imposed by the tax authorities. Thus, a final administrative punitive measure could preclude a subsequent criminal indictment for the same offence."* Desterbeck, F. (2019). p. 136.

27 ECtHR, *Öztürk/Germany*, App. No: 8544/79, 21/2/1984, § 53.

28 ECtHR, *Bendenoun/France*, App. No:12547/86, 24/2/1994, § 47.

29 *"This judgment of the ECtHR is great importance for taxpayers who are subject to a tax penalty, because the tax penalties, which are of a financial charecter and applied as multiples of the tax incurred, are accepted as "penalties" in the sense of criminal law and this result in the conclusion that taxpayers are under the protection of article 6, which constitutes the right to a fair trial. As a matter of fact, the ECtHR continues to assess tax penalties, which it considers to be "punitive and deterrent", within the scope of article 6."* (İnceoğlu, S. (2013). p. 94).

30 The ECtHR has made a similar assessment regarding tax law in the *Jussila/Finland (App. No: 73053/01, 23/11/2006)* application.

According to this, it accepts tax misdemeanors which are considered as crimes within the framework of the criteria it has developed, within the scope of the protection of the ne bis in idem principle[31].

Similarly, the TCC has concluded that the tax penalties imposed pursuant to Law no. 213 are also of a criminal character in its various decisions. Accordingly, in the established case-law of the TCC in individual applications, sanctions that are not subject to criminal cases are defined as punishment within the framework of autonomous interpretation and the proceedings related to these are examined within the scope of the criminal charge of the right to fair trial[32]. As a matter of fact, in the decision of *Ünal Gökpınar*, the TCC evaluated the judicial process regarding tax penalties in administrative jurisdiction as a criminal process[33].

As a result, the concept of *crime and punishment* in the constitutional sense has a different and autonomous content from criminal law. As stated, there is no doubt that crimes in the field of traditional criminal law are included in the concept of crime as interpreted by the TCC. However, the *concept of crime* is not limited to the crimes in the field of traditional criminal law, but it is possible to consider crimes in the field of administrative law as a crime in the constitutional sense. Accordingly, based on the established case-law of the ECtHR and the TCC, it is concluded that the tax penalties imposed in accordance with the Law no. 213 are also of a criminal character. In this way, the process that started as whether the tax penalty process pursuant to Law no. 213 or the process related to the crime of smuggling, the *"the execution of a trial process containing penal sanctions"* condition sought is met within the scope of the ne bis in idem principle.

b. Whether a Final Decision had been Taken in The Tax Proceedings

The assurance provided by the principle of ne bis in idem is that the person is not repeatedly tried and punished after a final decision against or in favour of the individual on his criminal responsibility by examining the merits of the criminal charge regarding an act subject to a

31 *ECtHR, A and B/Norway* [GC], App. No: 24130/11 and 29758/11, 15/11/2016, §§ 107, 136 and 138; *Matthildur Ingvarsdóttir/Iceland (committee) (dec.)*, App. No: 22779/14, 4/12/2018, §§ 45-46.

32 TCC, E.2014/120, K.2015/23, 5/3/2015; *Gür-Sel İnşaat Malzemeleri San. Tic. Ltd. Şti.*, App. No: 2013/4324, 7/7/2015; *B.Y.Ç.*, App. No: 2013/4554, 15/12/2015, § 31; *E.T.Y.İ. A.Ş.*, App. No: 2013/596, 8/5/2014, § 51.

33 TCC, *Ünal Gökpınar*, § 54.

criminal sanction[34]. For this condition to be met, there must be a judgment regarding a sanction, considered as a punishment within the framework of autonomous interpretation regardless of whether the decision-making authority is a judicial or administrative authority. In addition, there should be a decision that includes an evaluation in terms of whether the person has committed the relevant act or not, after the evaluation of the evidence and the determination of the facts in this trial[35].

What must be understood from the concepts of finality is that the decision is definite due to the absence of a legal remedy or exhausting the ordinary legal remedies or expiration of the stipulated deadlines for applying to them without making an application[36]. On the other hand, there is no difference between being final/finalized through the judiciary or the administrative penalties are finalized before they are brought to the judicial stage[37].

Accordingly, the rules in Law no. 213, which allow both an administrative fine and a sentence to imprisonment for the same act, are of a character that may lead to penal trial process after the first process has resulted in a conclusive conviction or acquittal. Therefore, the second condition sought is also met in order to conclude that there is a violation of the ne bis in idem principle in terms of the rules in Law no. 213.

c. Whether There was Duplication of Proceedings (Bis)

Another circumstance in which the principle of *ne bis in idem* has been violated is the execution of a second trial process. This principle provides assurance not only against being punished for the second time, but also against being tried for the second time regardless of whether the first judicial process resulted in a conviction or not.

It does not matter whether the repeated process starts before or after the decision made in the previous process. The important point is that one of the processes continues after the decision made in the other is

34 ECtHR, *Mihalache/Romania*, § 98.

35 ECtHR, *Mihalache/Romania*, § 95; TCC, E.2019/4, K.2021/78, 4/11/2021, § 29.

36 AİHM, *Mihalache/Romania*, §§ 103, 110.

37 In the case subject to the A and B/Norway decision of the ECtHR, the applicants did not appeal to the tax penalty and paid it. For this reason, the tax penalty process has been finalized without filing an administrative lawsuit. (*A and B/Norway*, §§ 16-32). However, the ECtHR has reviewed this process which has been finalized with the sanction of the tax administration, even though it has not been filed to the tax court within the framework of autonomous interpretation, in terms of contradiction to the principle of ne bis in idem.

finalized. Furthermore, it does not matter how the re-operated process is concluded[38].

The *principle of ne bis in idem* prohibits the initiation of second proceedings when the first proceedings are final. The Court has held that Article 4 of Protocol No. 7 clearly prohibits consecutive proceedings if the first set of proceedings has already become final at the moment when the second set of proceedings is initiated. On the other hand, the principle does not clash with that multiple trial proceedings are carried out synchronously. An administrative penalty can also be imposed for an unlawfulness in addition to the sanction foreseen in the field of criminal law, especially in order to protect the social and economic order. In such cases, the application of different penalties by different authorities does not violate the principle of ne bis in idem, as long as it maintains its complementary nature. However, there must be a sufficiently closely connected in substance and in time in order for the punishments applied by different authorities to be seen as complementary[39].

It is possible that the other process will continue to operate when one of the processes related to the tax penalty or tax evasion offence is concluded in the sanction system envisaged by Law no. 213. In this case, the third condition sought is also met in order to conclude that there is a violation of the ne bis in idem principle in terms of the rules in Law no. 213.

d. Whether the Offences were the Same (Idem)

The act that constitutes the subject of both proceedings must be the same in order for the principle of ne bis in idem to be applied. The perpetrator must be the same person and the subject of the trial must be the same in order for the act to be the same.

Although there are different opinions in the doctrine[40] regarding the same act condition, there is no hesitation in this matter in the decisions of both the ECtHR and the TCC[41]. Regarding the ne bis in idem principle,

38 ECtHR, *Zolotukhin/Russia*, § 110.

39 AİHM, *Österlund/Finland*, App. No: 53197/13, 10/2/2015, § 48.

40 Taşdelen, A. (2010). p. 65-66; Bahçeci, B. (2018). p. 154; Rençber, A. (2017). p. 487.

41 However, it is seen that the ECtHR used different criteria to explain the concept of the same act in its decisions before the *Glantz/Finland* decision. For instance, in *Ponsetti and Chesnel/France* **(**App. No: 36855/97 **and** 41731/98**, 14/9/1999) decision, it was stated that the element of intent was sought in the offence of tax evasion, but it was not sought in the financial crimes subject to administrative fine, thus, the decision was held based on the subjective elements of the acts. ECtHR**, in *Rosenquist/Sweden* **(**App. No: 60619/00, 14/9/2004**)**

the ECtHR has applied *the same events or events that are essentially the same* criteria, which it put forward in the *Zolotukhin v. Russia* decision[42] [43] with regard to the concept of the same act, in the *Glantz v. Finland*[44] and *A and B v. Norway* judgments in terms of tax offences and misdemeanours[45].

Indeed, a fact-based assessment was adopted by the aforementioned Court to determine the content of the concept of idem. The Court determined that what should be understood from the same (idem) was *the same events or events that are essentially the same*[46]. In addition, the result of the act was not emphasized. In other words, the point of tax loss was not taken into consideration, but with a holistic approach, the item of idem was *based on the event*, not the *act or penalty norm*.

As a matter of fact, similar to the approach of the ECtHR, the TCC did not adhere to the qualifications in domestic law when specifying whether the act was the same in the *Ünal Gökpınar* decision. The TCC pointed out that *"(…) Accordingly, the actions of the applicant that caused the criminal proceedings should be considered as the same act in the legal sense, since they*

decision, stated that the element of intent or gross negligence is the essential element for imprisonment sentence for tax evasion, whereas this element is not required for imposing an administrative fine, and that the purpose of the aforementioned penalties is not the same. In this decision, a distinction was made not in terms of the elements of the crime, but the legal benefit protected by the penalties. The Court, in *Manasson/Sweden* (App. No: 41265/98, 20/7/2004) decision, stated that the imprisonment sentence was imposed for the violation of the bookkeeping obligation and the administrative fine was imposed due to underreporting of income, therefore, did not find any violation of ne bis in idem principle on the ground that the acts requiring the imposing of the two penalties were different. ECtHR, in *Carlberg/Sweden* (App. No: 9631/04, 27/1/2009) decision, referring to the *Manasson/Sweden* decision, it concluded on similar grounds that it was not the same act in the case.

42 *"Concerning the attribute of idem, there have been three different approaches in the case law of the European Court of Human Rights since the harmonising (unifying) decision of the European Court of Human Rights in the case of Sergey Zolotukhin versus Russia, the decision on the application no. 14939/03, was adopted. According to this decision, article 4 of Protocol No. 7 to the European Convention on Human Rights should be interpreted in the sense that it prohibits the criminal prosecution for the second criminal offence in so far as it arises from identical facts or facts, which are substantially the same. Be so, the idem attribute exists pursuant to the European Court of Human Rights if the facts constitute 'a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space'"* Sejkora, T. (2019). p. 50.

43 Desterbeck, F. (2019). p. 137; Matic Boskovic, M. and Kostic, J. (2020). p. 71; Kelep Pekmez, T. (2018). p. 36-37.

44 ECtHR, *Glantz/Finland*, App. No: 37394/11, 20/5/2014.

45 In *Johannesson and Others/Iceland* (App. No: 22007/11, 18/5/2017) decision, the Court noted that the applicants' conviction and the imposition of tax surcharges were based on the same failure to declare income. Moreover, the tax proceedings and the criminal proceedings concerned the same period of time and essentially the same amount of evaded taxes (§ 47). In brief, the idem element of the ne bis in idem principle is present.

46 Harris, D., O'Boyle, M., Bates, E. and Buckley, C. (2018). p. 966.

form integrity within themselves in terms of purpose, time and place. In other words, as a result, it is understood that in both proceedings in the case, there is only one act based on the same facts in essence.".

The TCC, in its decision[47] referred to the decisions *Zolotukhin v. Russia (§§ 78-84, 97)* and *A and B v. Norway (§ 108)* of the ECtHR: *"(…) It is necessary to ensure temporal, spatial and factual sameness regarding the act in order to determine whether crimes and misdemeanors have been committed with the same act. In order for the same act to be mentioned, the facts leading to more than one prosecution or punishment must be the same events or events that are essentially the same and must occur at the same time and place.".*

In our opinion, it is an appropriate approach to explain the concept of the same act within the framework of the criteria of the same events or events that are essentially the same, accepted by the ECtHR and the TCC[48]. The definition of the same act in terms of the subjective elements of the crime/misdemeanour or the objective elements of the crime/misdemeanour, as some authors have argued in the doctrine or included in the previous decisions of the ECtHR, are the approaches that narrow the field of application of the ne bis in idem principle.

As a result, in the sanction system envisaged in Law no. 213, it is possible that the tax evasion offence and the misdemeanour of tax can be committed with acts that originate from the same events and facts and can be considered as the same act. For this reason, it is clear that the *same act* based on essentially the same facts is involved in both proceedings.

Therefore, when the system of sanctions provided for by Law no. 213 is assessed in the light of the conditions set out in Protocol No. 7 and embodied in the decision of the ECHR in *Nikitin v. Russia*, it can be said that it contains provisions that may lead to a contradiction with the ne bis in idem principle.

47 TCC, E.2019/4, K.2021/78, 4/11/2021, § 31.

48 *"Both the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) have opted for the 'idem factum' interpretation in their recent case law. This development should be warmly welcomed, as only this interpretation guarantees the effective protection of the individual against undue multiple prosecutions."* Lelieur, J. (2013). "Transnationalising' Ne Bis In Idem: How the Rule of Ne Bis In Idem Reveals the Principle of Personal Legal Certainty", *Utrecht Law Review,* Vol. 9., No. 4., p. 205. http://doi.org/10.18352/ulr.250 (Accessed: 15 December 2022).

3. Evaluation of the Sanction System Envisaged in the Law No. 213 in Terms of Special Situations Eliminating the Violation of Ne Bis In Idem Principle

There are some special circumstances that may lead to the conclusion that a legal regulation is not in violation of the ne bis in idem principle, despite the occurrence of conditions that result in a violation of the ne bis in idem principle.

Two of the particular circumstances that do not violate the ne bis in idem principle are contained in Protocol No. 7, and these unique circumstances are the emergence of new evidence and the existence of a fundamental flaw that may affect the outcome of the case. Moreover, one of the particular circumstances identified by the case law of the ECtHR is that the trials are conducted in an integrated manner to form a coherent whole, even though there are technically several trials[49].

Although the ECtHR has partially changed the criteria to be applied in its judgment in which it discusses the principle of ne bis in idem, it puts the case to the test within the framework of the criteria included in many of its recent judgments.

In this context, the ECtHR, for example, has determined that the decisions taken by the authorities applying criminal and administrative sanctions according to the Finnish legal system do not affect each other and both types of sanctions are imposed independently of each other in the *Glantz v. Finland* judgment. The Court has also specified that none of the sanctions imposed by the court or the administration is considered by the other court or administration during the determination of the sentence in this judgment. Thus, the ECtHR has concluded that there was not a sufficiently close connection in substance and in time and handed down a violation ruling[50].

49 TCC, E.2019/4, K.2021/78, 4/11/2021, § 32: *"If the first four conditions are met together, a violation of the principle occurs. However, in international law, some special situations that may constitute an exception to the principle are envisaged. These should also be considered in the interpretation of the Constitution in the context of the aforementioned principle. In this context, the first two exceptions are the emergence of new evidence and the existence of a fundamental defect that may affect the outcome of the case, which is included in paragraph (2) of article 4 of Protocol No. 7 and is also accepted in Turkish law. The third exception, developed by the ECtHR case-law, is the criminal processes are carried out in an integrated manner (even if more than one in form) to form a unity (ECtHR, A and B/Norway [GC], Appl. No: 24130/11 and 29758/11, 15/11/2016, § 130)."*

50 It is seen that the ECtHR continued the same approach in its other decisions regarding the ne bis in idem principle in terms of tax criminal law. According to this, in *Kiiveri/Finland* (App.

The Court applied the same evaluation in the *A and B v. Norway* judgment. In its judgment, the ECtHR examined whether there is a relationship between administrative and judicial proceedings[51]. At this point, the Court found that the tax fines previously imposed on the applicants were taken into account when imposing imprisonment against the applicants. In addition, the ECtHR stated that the two proceedings proceeded synchronously, complemented each other, and therefore had foreseeable consequences. As a result, the ECtHR held that the applicants were not subjected to an unfair and/or disproportionate sanction, the two proceedings were sufficiently close connection in substance and in time, and concluded that there was no violation of the principle of ne bis in idem[52].

The ECtHR, in its recent judgments, has adopted a jurisprudence that a predictable and complementary repeated trial and punishment by the authorities that are aware of and interact with each other and that consider the sanctions imposed by each other will not violate the principle of ne bis in idem.

The ECtHR has demonstrated this approach in its landmark ruling of *A and B* ***v.*** *Norway* case, it concluded that article 4 of Protocol No. 7 does not exclude the option of multiple trials if certain conditions are met[53]. However, in this judgment, it opined that the state, which imposed

No: 53753/12, 10/2/2015) decision, it has been concluded that the principle of ne bis in idem has been violated due to the fact that the administrative fine and tax evasion offence are caused by the same act in the form of not declaring the tax, because the trials are carried out in different judicial processes without providing assurances. In *Österlund/Finland* decision, it has been concluded that the principle of ne bis in idem has been violated since the applicant, who was tried for tax evasion and the administrative fine imposed for not declaring the tax, was tried in different proceedings without providing assurances. Similarly, the ECtHR continued the approach, adopted in the *Glantz/Finland* decision, in the *Nykänen/Finland* (App. No: 11828/11, 20/5/2014) and *Lucky Dev/Sweden* (App. No: 7356/10, 27/11/2014) decisions.

51 *A and B/Norway* judgment held by ECtHR has been criticized in many aspects in the doctrine. Most important of these criticisms are that the ECtHR substantially reduced the scope of protection of the ne bis in idem principle with regard to dual criminal and administrative punitive proceedings in respect of the same offence. For some criticisms about the judgment, see also: Mirandola, S. and Lasagni, G. (2019). p. 128-129.

52 Mirandola, S. and Lasagni, G. (2019). p. 127-128; Czudek, D. (2019). p. 119.

53 ECtHR, *A and B/Norway* [GC], (App. No: 24130/11 and 29758/11, 15/11/2016) § 130:*" On the basis of the foregoing review of the Court's case-law, it is evident that, in relation to matters subject to repression under both criminal and administrative law, the surest manner of ensuring compliance with Article 4 of Protocol No. 7 is the provision, at some appropriate stage, of a single-track procedure enabling the parallel strands of legal regulation of the activity concerned to be brought together, so that the different needs of society in responding to the offence can be addressed within the framework of a single process. Nonetheless, as explained above (see notably paragraphs 111 and 117-120), Article*

sanctions, had to convincingly demonstrate that the aforementioned multiple proceedings were sufficiently close connection in substance and in time in order to conclude that there was no violation of the principle of ne bis in idem[54].

The ECtHR evaluates whether there is a sufficiently close connection in substance between the processes within the framework of the following criteria[55]:

i. whether the different proceedings pursue complementary purposes and thus address, not only in abstracto but also in concreto, different aspects of the social misconduct involved,

ii. whether the duality of proceedings concerned is a foreseeable consequence, both in law and in practice, of the same impugned conduct (idem),

iii. whether the relevant sets of proceedings are conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities to bring about that establishment of facts in one set is also used in the other set,

iv. and, above all, whether the sanction imposed in the proceedings which become final first is taken into account in those which become final last, so as to prevent that the individual concerned is at the end made to bear an excessive burden[56].

This exceptional situation, which is not explicitly included in the text of Article 4 of Protocol No. 7 and developed by the ECtHR through interpretation, can be taken into account when evaluating whether the

4 of Protocol No. 7 does not exclude the conduct of dual proceedings, even to their term, provided that certain conditions are fulfilled."

54 *"As noted above, the same conduct can be potentially subject to duplication in relation to proceedings that occur in parallel (dual proceedings), as opposed to which follow consecutively from the other. The leading case on the former A and B/Norway, which concerned omissions in income tax returns giving rise to proceedings in tandem, one of which resulted in an administrative fine (tax surcharge: held to be autonomously 'criminal' for the purposes of Article 4), the other of which resulted in a criminal conviction (tax fraud). Article 4 could apply in such cases, but the matter had to be approached with caution, the Court acknowledging the need to afford states some latitude in this regard. (….) As such, the onus was on the State to establish that the conduct of dual proceedings was 'sufficiently closely connected in substance and in time'."* (Harris, D., O'Boyle, M., Bates, E. and Buckley, C. (2018). p. 966-967.)

55 ECtHR, *A and B/Norway*, § 132.

56 TCC, E.2019/4, K.2021/78, 4/11/2021, § 33.

sanction system adopted by Law no. 213 is in accordance with the principle of ne bis in idem. It can be concluded that there is no violation of the ne bis in idem principle when the existence of this situation is observed. It should also be noted that although the TCC did not use these criteria in the decision of *Ünal Gökpınar*, it benefited from these criteria developed by the ECtHR in its decision numbered E:2019/4, K:2021/78, 4/11/2021.

a. Whether the Processes Have Different Complementary Purposes

It is necessary to explain how tax misdemeanors and tax evasion offences constitute a concrete response to different aspects of the same act. Since what is required in terms of this criterion is that it has a *different* but *complementary purpose*. Therefore, homogenization of purpose violates the principle of *ne bis in idem*[57].

The imposition of sanctions basically has three purposes: deterrence, compensation and reclamation. In this context, it is important to determine the purpose of the sanctions foreseen for non-fulfilments of tax duties and the legal nature of the sanctions that emerge as a result of this purpose. The feature of suppression and punishment comes to the fore in order to protect the social order in the sanctions envisaged to ensure the fulfilment of the tax duty. However, although this is the general purpose of both tax offence and tax misdemeanors, it is a fact that the administrative process aims to ensure that individuals fulfill their tax obligations by imposing a certain amount of fine while the judicial process aims to protect the public order.

In some of its judgments, the TCC emphasized the complementarity relationship between the penalties imposed for tax offences and tax misdemeanors and concluded that the principle of ne bis in idem had not been violated[58].

57 As a matter of fact, in the *Korneyeva/Russia* (App. No: 72051/17, 8/10/2019, § 62) decision, the ECtHR disregarded the Russian Government's defense that the protection areas of each of the crimes that are the subject of more than one process are different and concluded a violation.

58 In its decision numbered E.2019/4, K.2021/78, 4/11/2021, the TCC says (§ 78): *"Whether different trial/punishment processes have complementary purposes is related to whether different disciplines of the legal order focus on different aspects of the illegal act. The aim of the crime of smuggling is to punish those who commit the illegal acts that constitute the crime, to deter people from committing these acts in this way, to protect public order by prohibiting each act that is organized as a crime. On the other hand, the purpose of administrative sanctions, which are applied according to administrative law procedures due to tax misdemeanors, without a judicial decision, is to protect the tax administrative order, and in this context, to impose effective and deterrent sanctions on the behavior of taxpayers*

As a result, the main purpose of the administrative sanction imposed due to tax misdemeanor is to protect the tax administrative order[59], and thus, to ensure that individuals fulfill their obligations in the tax system in accordance with the legislation[60]. On the other hand, it can be argued that the purpose of judicial sanctions related to taxation is to punish those who commit unlawful acts, which are generally considered as crimes, to deter and reclaim people from committing these acts in this way, and to protect the public interest[61].

In this respect, both punishments have a complementary nature and therefore this criterion in which the processes have different but complementary purposes has been met.

b. Whether Multiple Processes Related to the Same Act are Foreseeable

It should be clear and predictable that multiple processes can be taken regarding the same act in legal regulations.

The TCC also considers that a law restricting fundamental rights should have these qualities as a requirement of the rule of law, which is guaranteed in Article 2 of the 1982 Constitution. Accordingly, legal regulations should be clear, understandable, applicable and objective,

and responsible persons in violation of their obligations in tax laws. In this respect, it can be said that two separate punishment procedures, one judicial and the other administrative, which are essentially related to the same act but protect different legal values, pursue complementary purposes."

59 Şenyüz, D. (2017). *Vergi Ceza Hukuku (Vergi Kabahatleri ve Suçları),* Tenth Edition, Bursa: Ekin Yayınları, p. 8; Sarıcaoğlu, E. (2017). p. 156-157.

60 Taşdelen, A. (2010). p. 18-22,

61 The ECtHR made the following assessments in its decision on *A and B/Norway* (§ 144) about the different complementary purposes of administrative and judicial processes: *"144. The competent national authorities found that the first applicant's reprehensible conduct called for two responses, an administrative penalty under chapter 10 on Tax Penalties of the Tax Assessment Act and a criminal one under chapter 12 on Punishment of the same Act (see paragraphs 15, 16 and 41-43 above), each pursuing different purposes. As the Supreme Court explained in its judgments of May 2002 (see paragraph 46 above), the administrative penalty of a tax surcharge served as a general deterrent, as a reaction to a taxpayer's having provided, perhaps innocently, incorrect or incomplete returns or information, and to compensate for the considerable work and costs incurred by the tax authorities on behalf of the community in carrying out checks and audits in order to identify such defective declarations; it was concerned that those costs should to a certain extent be borne by those who had provided incomplete or incorrect information. Tax assessment was a mass operation involving millions of citizens. For the Supreme Court, the purpose of ordinary tax penalties was first and foremost to enhance the effectiveness of the taxpayer's duty to provide complete and correct information and to secure the foundations of the national tax system, a precondition for a functioning State and thus a functioning society. Criminal conviction under chapter 12, on the other hand, so the Supreme Court stated, served not only as a deterrent but also had a punitive purpose in respect of the same anti-social omission, involving the additional element of the commission of culpable fraud."*

and should also contain protective measures against arbitrary practices by public authorities. These qualifications, which must be present in the law, are also obligatory in terms of ensuring legal security[62].

There are regulations that allow imposing of both administrative fines and imprisonment in Law no. 213 for the same acts, and it is clearly regulated and foreseeable in the relevant articles of this Law. In other words, taxpayers or other related persons are in a position to foresee that both the judicial sanctions process and the administrative process can be initiated due to their acts contrary to tax laws and they can be punished for the act they have committed as a result of these processes.

The TCC also noted: *"Considering that the judgment/punishment processes regarding tax evasion offence and tax misdemeanors and the penalties to be imposed at the end of these processes are regulated with sufficient certainty in the relevant articles of the Law no. 213, it is understood that these processes are predictable."*[63]

c. Whether Sufficient Interaction is Provided in the Collection and Assessment of Evidence and Determination of Cases Between Processes

It is necessary to establish a system that provides the necessary guarantees to be able to say that proceedings in respect of the same act are conducted *in an integrated manner, as parts of a whole*. In the absence of such a system, the conduct of multiple proceedings for sanctions and penalties imposed on individuals for the same act at the end of the proceedings will constitute a violation of the ne bis in idem principle.

The regulations in Law no. 213 should be analyzed in order to determine whether a system that will provide the necessary assurances has been established by the law. The purpose of tax inspection is stated as researching, determining and ensuring the accuracy of the taxes to be paid in Article 134 of Law no. 213. In Article 137 of the same Law, it is stated that natural persons and corporate entities who are obliged to keep records and accounts, preserve and submit documents according to this Law or other laws are subject to tax inspections.

According to the first paragraph of Article 367 of Law no. 213, when the tax evasion offences set forth in Article 359 of Law no. 213 have been committed at the end of the investigation, it is obligatory to report the

62 TCC, E.2015/41, K.2017/98, 4/5/2017, §§ 153-154; TCC, E.2019/100, K.2020/62, 22/10/2020, § 19.
63 TCC, E.2019/4, K.2021/78, 4/11/2021, § 79.

situation to the Chief Public Prosecutor's Office[64]. According to the second paragraph of Article 367 of Law no. 213, if it is informed that the crime has been committed by means other than tax inspection, the public prosecutor must first request an investigation from the relevant tax office. In this case, the result of the investigation must be reported to the Public Prosecutor's Office in order to open a public case.

Punishment and judgment processes regarding tax misdemeanours will also be initiated with the preparation of the tax inspection report. It is stipulated: *"The events that require tax penalties will be determined by the tax offices or those authorized to audit and tax inspection"* in Article 364 of Law no. 213.

As can be seen, the punishment processes begin with the reports prepared on the tax inspection in case of committing the tax evasion crimes regulated in Article 359 of Law no. 213 and committing tax misdemeanors in connection with these. Until this phase, the process of imputing of a crime and misdemeanour and therefore the information and documents related to the accusation are the same. It is likely that more or less the same evidence will be presented to both the tax court and the criminal court by the defendants against this charge. Therefore, since the same materials were found before both courts at the beginning of the proceedings, it can be supposed that there is a similarity between the processes until this phase[65].

However, the sentencing and trial process are carried out independently of each other after the initial phases[66]. In the next process, the tax court and the criminal court try to end the case by collecting all kinds of evidence they deem necessary. At this phase, there is no regulation that will force the courts to interact[67].

64 *"Purpose of article 367 of Law No. 213 is that it is the requirement and desire to bring the dispute to the criminal court after a technical inspection in matters that require technical expertise such as finance and economics and which lawyers are generally unfamiliar with."* (Rençber, A. (2017). p. 390.)

65 In the TCC, in its decision numbered E.2019/4, K.2021/78, 4/11/2021 (§ 80), *"The prosecution/ punishment processes regarding tax evasion offence and tax misdemeanors committed with the same act are mainly based on tax examination. The judicial process begins with the submission of the tax crime report and opinion prepared on the basis of the determinations in the tax inspection report to the Office of the Chief Public Prosecutor, and the administrative punishment process begins with the submission of the tax inspection report to the tax office. At this initial phase, the evidence presented by the administration in both processes is the same."* is called.

66 Akkaya, M. (2000). "Vergi Mahkemesi ve Ceza Mahkemesi Kararlarının Etkileşimi Üzerine Bir İnceleme", *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 49., No. 1., p. 87.

67 In the TCC, in its decision numbered E.2019/4, K.2021/78, 4/11/2021 (§ 81), *"On the other hand, after the initial phases, the proceedings are carried out completely independently of each other. An*

From this point of view, it is seen that Article 340, the last paragraph of Article 359 and the sixth paragraph of Article 367 of Law no. 213 do not contain a provision that prevents the interaction of dual (criminal/ administrative) processes. These rules allow multiple trials and punishments for the same offence. However, the aforementioned rules do not contain a regulation that prevents interaction between the competent authorities during the execution of the relevant processes.

However, a separate evaluation should be made in terms of the last paragraph of Article 367 of Law no. 213 on the subject. Because, it is regulated that the decisions of the criminal court will not bind the authorities imposing the tax penalties, and the decisions of these authorities will not bind the criminal judge with the last paragraph of Article 367 of Law no. 213.

As stated above, punishment and trial processes regarding tax misdemeanor and tax evasion are carried out independently of each other, except for the initial phases. In addition, it is not possible to make a trial based on this legal opinion for a crime other than the crime specified in the legal opinion, which is accepted as a condition for litigation/prosecution in a criminal case. Continuing the lawsuit filed with an indictment that does not comply with the aforementioned legal opinion will be unlawful[68]. In other words, the acts subject to tax crime report, legal opinion, indictment and judgment must be the same.

Therefore, it is not always possible to maintain that the two processes are carried out independently of each other or that the public authorities carrying out these two processes do not interact with each other in any way.

In addition to this issue, it is necessary to evaluate whether the decisions of the criminal and tax courts, which judge the disputes emerging from the same act with different dimensions, affect each other.

The tax administration and the tax court decide on tax misdemeanors, and the criminal court decides on tax crimes. Therefore, it can be accepted as an appropriate arrangement that the decisions made as a result of different proceedings are not considered as binding on each other for these illegalities that are in a separate norm system.

interaction between the processes that will prevent any repetition in the collection and evaluation of evidence is not included in the rule in question or in other rules." is called.

68 Şenyüz, D. (2017). p. 370.

On the other hand, there is a difference between them in terms of subjective elements just as the procedure to be followed in the pursuit of tax crimes and tax misdemeanors and the procedures of judgment are different even if there is unity in the objective elements. It becomes difficult to establish an absolute rule regarding the binding of the criminal court and tax court decisions when these issues are taken into consideration. In this framework, the differences between judicial processes and administrative processes in terms of assessment of evidence, elements of crime and misdemeanour and trial procedure can also be reflected in the decisions of criminal court and tax court. In this respect, it is not possible to conclude that the decisions of different authorities, which deal with an act that is the subject of both tax evasion and tax misdemeanors with different dimensions and that qualify and evaluate them according to their own procedures and rules, should be linked under all circumstances[69].

There is no problem if the decisions taken by both judicial branches are in the same direction as a result of the proceedings. However, if they hold different decisions about the existence and absence of tax crime/misdemeanor, a discrepancy situation will arise. For this reason, it is quite important that the processes are carried out in coordination with each other in cases where both courts are likely to decide on the same issue in order to prevent problems that may occur later.

As stated above, the principle of ne bis in idem does not exclude multiple trial/punishment processes and therefore the imposing of multiple punishments, provided that certain circumstances are met. The imposing of multiple penalties is at the discretion of the legislature in the event that guarantees are provided for the integrated manner so as to form a coherent whole. Accordingly, the rules that do not exclude the interconnected maintenance of the processes related to punishments, but only prescribe multiple punishments and do not allow them to be combined, do not have any aspect contrary to the principle of ne bis in idem[70].

A person can be punished with both a tax offence and a tax misdemeanor for the same act in accordance with the last paragraph of Articles 340, 359 and the sixth paragraph of Article 367 of Law n o. 213 in Turkish tax law.

69 TCC, E.2019/4, K.2021/78, 4/11/2021, § 88.

70 TCC, E.2019/4, K.2021/78, 4/11/2021, § 58.

From the perspective brought by the ECtHR, it can be supposed that the absence of interaction between each other is not due to the aforementioned rules[71].

First of all, the absence of interaction between the criminal court and tax court judgments that adjudge the disputes emerging from the same act with different dimensions is due to the absence of a regulation in the tax legislation. Another reason for this situation is Article 367 of Law no. 213, which regulates that the judgments of the criminal court do not bind the authorities that impose the tax penalties, and that the decisions of these authorities do not bind the criminal court. This is another reason for the absence of interaction between them. For this reason, the TCC held to annul the last paragraph of Article 367 of Law no. 213.

In this case, establishing a connection between judicial processes regarding the tax evasion offence and the tax misdemeanors committed with the same act appears as a constitutional necessity in terms of actualizing the guarantees provided by the ne bis in idem principle after the annulment of the last paragraph of Article 367 of Law no. 213 by the TCC.

d. Whether the Processes are Connected in Terms of Time

Linkage in terms of time means that two processes are synchronous. However, according to the ECtHR, this principle does not mean that the two processes should be carried out simultaneously from start to finish. States have discretion in advancing these processes taking gradually into account different social objectives. However, the absence of sufficiently closely connected in terms of time between these two processes should not push the individual into uncertainty.

While assessing whether the absence of sufficiently closely connection in terms of time is reasonable, the attitude of the authorities carrying out the two processes and whether they advance the processes in interaction are taken into account. If there is an unreasonable absence of sufficiently closely connection in terms of time between the two processes, this may be interpreted as an indication of the absence of a connection, unless an appropriate explanation is provided by the public authorities for reasons attributable to the conduct of the proceedings.

71 For opinions to the contrary, also see: Yaltı, B. (2015). p. 90-91; Biyan, Ö. (2016). p. 105.

From this point of view, the administrative and judicial processes start on almost the same dates and carry out simultaneously for a while in the sanction system envisaged by Law no. 213. For this reason, it is highly likely that the processes will be completed closely to each other, except for extraordinary circumstances. Therefore, we consider that the temporal difference between the two processes will not exceed a reasonable level, which is one of the criteria set out by the ECtHR.

After all, the temporal difference between these two processes, which are carried out partly simultaneously, does not cause uncertainty for the individual, nor does it cause the appearance of procrastination. Thus, there is a sufficiently closely connection in terms of time between the integrated dual (criminal/administrative) process.

e. Whether the Sanctions Imposing in the Proceedings Which Become Final First is Taken Into Account in Other Trials

The last condition necessary for the fulfillment of the condition that multiple trial processes be carried out in an integrated manner so as to form a coherent whole is the existence of balancing mechanisms against the risk of creating an excessive burden of the total penalty imposed against the person. In this context, it is possible that the total penalty will reach a level that may cause a disproportionate burden on the person in cases where both processes are concluded against the person.

The principle of ne bis in idem does not prevent the application of complementary sanctions by different authorities for different social purposes in case an unlawfulness violates different legal values. In particular, it is possible to impose administrative sanctions as well as judicial penalties for an unlawfulness* in order to protect the social and economic order. In this instance, the important thing is that these two punishments are imposed in a complementary way. As a matter of fact, the ECtHR, in the *Glantz v. Finland* decision which it even concluded in a violation, indicates that within the discretion of the legislature to impose an administrative fine in addition to the imprisonment to be imposed by the criminal court[72]. In its decision *A and B v. Norway*, the ECtHR underlined that the tax fines previously imposed had been taken into account when sentencing the applicants in criminal proceedings, thus it was concluded

72 Bahçeci, B. (2018). "İHAM'ın Vergi Cezalarında Ne Bis İn İdem İçtihadı İle Türk Hukukunun Uyum Sorunu", *Türk Barolar Birliği Dergisi,* No. 136. p. 159-160.

that the applicants had not been subjected to unfair or disproportionate sanctions[73].

Similarly, The TCC emphasized:, *"On the other hand, in order to prevent the total penalty imposed as a result of both trials from creating an excessive burden on the person, it should also be assessed whether the penalty in the first trial was considered in the next trial, and whether the public authorities conducting both processes interacted with each other. In this context, if the result causes a disproportionate burden on the person, the element of complementarity and thus the objective connection may be weakened in cases where both processes result in punishment."*[74].

At this instance, it is necessary to examine in Law no. 213 to determine whether preventive rules or at least balancing mechanisms have been established against the risk of creating an excessive burden of the total penalty imposed against the person concerned in the integrated dual (criminal/administrative) process.

At this point, the last paragraph of Article 367 of Law no. 213, which includes the regulations regarding the interaction between the administrative and judicial proceedings, is important in terms of explaining the subject because, the decisions of the criminal court are not effective on the decisions of the authorities imposing the tax penalties, and the decisions to be made by these authorities do not bind the criminal judge according to the last paragraph of Article 367 of Law no 213. Also, in practice, the tax court and the criminal court adjudge independently and without waiting for each other.

Therefore, it would not be wrong to talk about the absence of interaction between administrative authorities and criminal courts, as well as tax courts and criminal courts, regarding the sanction to be imposed because of the last paragraph of Article 367 of Law no 213. In addition, there is no regulation in Turkish tax legislation that will enable the processes to interact with each other. For this reason, both judicial authorities do not benefit from the opportunities that will enable the processes to be carried out in connection. As a result, balancing mechanisms are not established in cases where the risk of creating an excessive burden of the total penalty imposed by the legislature against the person[75].

73 Geçer, A. E. (2017). p.119.

74 TCC, E.2019/4, K.2021/78, 4/11/2021, § 84.

75 The TCC, *"In this respect, the rule, which does not include any assurances that will enable the*

For the reasons explained, the last paragraph of Article 367 of Law no. 213, which causes the absence of interaction between tax courts and criminal courts, prevents the fulfilment of the condition of interaction between sanctions, which is among the criteria brought by the ECtHR, and as such, ne bis in idem appears to be in breach of the principle. As a matter of fact, the TCC decided to annul the aforementioned rule.

In our opinion, balancing mechanisms should be established against the risk of creating an excessive burden of the total sanctions imposed against the individual after the TCC's annulment decision. This situation emerges as a necessity in order to accept that the condition of conducting multiple trial processes is fulfilled in an integrated manner so as to form a coherent whole, in a way that would be complying with ne bis in idem principle. Accordingly, considering within the framework of the criteria applied in the decisions of the ECtHR, in case of committing the acts written in Article 359 of Law no. 213, it is possible to impose imprisonment due to tax evasion and also administrative fine of up to three times the tax according to the last paragraph of Article 344. This may cause an excessive burden, which may be in violation of the ne bis in idem principle.

Finally, it is necessary to focus on how a balancing mechanism must be established against the risk of creating an excessive burden of the total sanction imposed against the person as a result of both proceedings. At this point, considering that the imposing of both an administrative fine for tax misdemeanor and imprisonment for tax evasion will not result in violation of the principle of ne bis in idem, there is no obligation to abolish one of these sanctions and make a legal arrangement ensuring that only one of them can be imposed. Nonetheless, it can be considered to reduce the amount of administrative fines and imprisonment penalties, which are envisaged in Law no. 213. Besides, regulations aiming to get rid of penal sanction or commute a sentence, such as effective remorse can be legislated. Moreover, in terms of tax misdemeanour, it may be possible to reduce the tax loss penalty or if the person is punished with an imprisonment penalty, the penalty for loss of tax may be abolished.

connection with the judicial/punishment processes regarding the sanction to be imposed as a result of the tax evasion offence and tax misdemeanors committed by the same perpetrator with the same act, is of the nature to prevent the fair execution. Because, the rule prevents the penalty in the first trial from being taken into account in the next trial in order to prevent an excessive burden on the person, furthermore does not allow interaction between processes and does not allow the application of balancing mechanisms in cases where the risk of creating an excessive burden of the total penalty imposed against the person." (TCC, E.2019/4, K.2021/78, 4/11/2021, § 85) says.

Lastly, we should point out that significant changes were made in Article 359 of Law no. 213 with Law no. 7394 legislated on 8/4/2022. Although the regulations made with Law no. 7394 were created with different motives, they can be seen as a positive step in terms of ensuring the compatibility of the sanction system envisaged in Law no. 213 with the principle of ne bis in idem.

Looking at the content of the regulations amended, some arrangements have been legislated in parallel with the recommendations in the article. These aim to implement a regulation similar to the effective remorse for tax evasion offences and to apply the successive offense in Article 43 of the Turkish Penal Code for the imprisonment to be sentenced because of tax evasion with the amendments made in Article 359 of Law no. 213.

The regulations legislated with Law no. 7394, within the framework of the criteria adopted in the decisions of the ECtHR, will be capable of preventing to a certain extent the sanctions to be imposed pursuant to Law no. 213 from causing an excessive burden on the person. Nevertheless, it is difficult to say that the regulations enacted by Law no. 7394 are sufficient to ensure compatibility of the sanction system envisaged in Law no. 213 with the principle of ne bis in idem.

CONCLUSION

The paper has shown that some of the wrongful acts, which are defined as tax misdemeanors and for which administrative fines are envisaged in the Law no. 213, overlap with the acts considered as tax evasion offence. This situation brings up the debate whether the sanction system envisaged by Law no. 213 is against the principle of ne bis in idem.

It can be supposed that the sanction system envisaged by Law no. 213 includes regulations that may result in violation of the principle of ne bis in idem. However, there are some special circumstances that lead to the conclusion that legal regulation is not contrary to the principle of ne bis in idem. One of the special circumstances that may lead to the conclusion that the rules regarding the sanction system in Law no. 213 are not contrary to the principle of ne bis in idem is the fact that the multiple proceedings are sufficiently closely connected in substance and in time.

According to this, the necessary conditions for the acceptance that the multiple proceedings are sufficiently closely connected in substance and in time are met in terms of the sanction system envisaged in Law no. 213.

From this point of view, Article 340, the last paragraph of Article 359 and the sixth paragraph of Article 367 of Law no. 213 do not contain a provision that prevents the interconnected conduct and interaction of integrated dual (criminal/administrative) processes. These rules allow multiple trials and punishments for the same act. However, the aforementioned rules do not contain a regulation that prevents interaction between the competent authorities during the execution of the relevant processes.

However, a separate assessment should be made in terms of the last paragraph of Article 367 of Law no. 213 on the subject, because, the absence of interaction between the criminal and tax court decisions adjudicating the disputes are based on the same act with different dimensions arises from the last paragraph of Article 367 of Law no. 213.

As we have seen, the TCC struck down the last paragraph of Article 367 of Law no. 213 on the grounds that it does not comply with the ne bis in idem principle. Following this ruling, the legislative is expected to enact a new legislation to take the criteria stipulated in the Additional Protocol No. 7 into consideration. The new legislation should include a balancing mechanism against the risk of creation of an excessive burden due to total sanction imposed against the person. In this way, a permanent solution to the problem we have analyzed in the paper may be fixed.

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